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Sixth report on reservations to treaties

By Mr. Alain Pellet, Special Rapporteur

Addendum

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[44] This chapter is the continuation and end of chapter III of the fifth report, section A.1 of which dealt with the moment of formulation of reservations and interpretative declarations (A/CN.4/508/Add.3 and 4, paras. 230-332).

[45] This section is the continuation and end of chapter III of the fifth report (ibid.).

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II. Formulation, modification and withdrawal of reservations and interpretative declarations

36. In his fifth report, the Special Rapporteur introduced 14 draft guidelines[46] concerning the moment when a reservation or an interpretative declaration may be made.[47] This question need not be further considered here, given that the Commission and the Drafting Committee will doubtless wish to take account of the comments made by States during the discussions in the Sixth Committee on some of these drafts.[48]

37. It was not, however, possible in the fifth report to address the question of the modalities of formulating reservations and interpretative declarations in terms of both their form and their notification. This will be the subject of the first part of this chapter, while the second part will deal with their withdrawal and modification.

A. Modalities of formulating reservations and interpretative declarations

38. Under article 23, paragraph 1, of the 1969 and 1986 Vienna Conventions,[49] a reservation "must be formulated in writing and communicated to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty". The provision thus imposes two conditions on the formulation of reservations: one purely of form — they must be in writing; the other of a procedural nature — they must be communicated to other "interested" States and international organizations.[50]

39. An additional question is whether these two conditions are also applicable, mutatis mutandis, to interpretative declarations, whether conditional or not.

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[46] These are draft guidelines 2.2.1 (Reservations formulated when signing and formal confirmation), 2.2.2 (Reservations formulated when negotiating, adopting or authenticating the text of the treaty and formal confirmation), 2.2.3 (Non-confirmation of reservations formulated when signing [an agreement in simplified form] [a treaty that enters into force solely by being signed]), 2.2.4 (Reservations formulated when signing for which the treaty makes express provision), 2.3.1 (Reservations formulated late — see also the three draft model clauses annexed to the provision), 2.3.2 (Acceptance of reservations formulated late), 2.3.3 (Objection to reservations formulated late), 2.3.4 (Late exclusion or modification of the legal effects of a treaty by procedures other than reservations), 2.4.3 (Times at which an interpretative declaration may be formulated), 2.4.4 (Conditional interpretative declarations formulated when negotiating, adopting or authenticating or signing the text of the treaty and formal confirmation), 2.4.5 (Non-confirmation of interpretative declarations formulated when signing [an agreement in simplified form] [a treaty that enters into force solely by being signed]), 2.4.6 (Interpretative declarations formulated when signing for which the treaty makes express provision), 2.4.7 (Interpretative declarations formulated late), 2.4.8 (Conditional interpretative declarations formulated late).

[47] A/CN.4/508/Add. 3 and 4, paras. 214-332.

[48] See paras. 17 and 18 above.

[49] As in the previous reports on reservations to treaties, unless otherwise indicated, quotations refer to the text of the 1986 Vienna Convention, which reproduces the 1969 text, but includes international organizations.

[50] To use a neutral term provisionally. On the exact definition of "other States and international organizations", see paras. 98-114 below.

1. Form and notification of reservations and interpretative declarations

(a) Form of reservations

40. Although it is not included in the actual definition of a reservation[51] and the word "statement", which is included, refers to both oral and written statements, the need for a reservation to be in writing was never called into question during the *travaux préparatoires* for the Vienna Conventions. The Commission's final commentary on what was then the first paragraph of draft article 18 and was to become, without any change in this regard,[52] article 23, paragraph 1, of the 1969 Vienna Convention, presents it as self-evident that a reservation must be in writing.[53]

41. That was the opinion expressed in 1950 by Brierly, who, in his first report, suggested the following wording for article 10, paragraph 2:

> "Unless the contrary is indicated in a treaty, the text of a proposed reservation thereto must be authenticated together with the text or texts of that treaty or otherwise formally communicated in the same manner as an instrument or copy of an instrument of acceptance of that treaty".[54]
>
> (Sauf si un traité en dispose autrement, le texte d'une réserve proposée à un traité doit être authentifié en même temps que le ou les textes de ce traité ou communiqué formellement de la même manière qu'un instrument, ou que la copie d'un instrument, d'acceptation dudit traité.)

42. This suggestion elicited no objections (except to the word "authenticated") during the discussions in 1950,[55] but the question of the form that reservations should take was not considered again until the first report by Fitzmaurice in 1956; under draft article 37, paragraph 2, which he proposed and which is the direct precursor of current article 23, paragraph 2,

> "Reservations must be formally framed and proposed in writing, or recorded in some form in the minutes of a meeting or conference ...".[56]

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[51] Cf. draft guideline 1.1 of the Guide to Practice, which combines the definitions in article 2, paragraph 1 (d), of the 1969 and 1986 Vienna Conventions and article 2, paragraph 1 (j), of the 1978 Convention:
"'Reservation' means a unilateral *statement*, however phrased or named, made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty or by a State when making a notification of succession to a treaty, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to exclude that international organization" (emphasis added).

[52] The Vienna Conference added a more precise definition of those to be notified of reservations: see para. 105 below.

[53] See *Yearbook ... 1966*, vol. II, p. 208.

[54] First report on the law of treaties, *Yearbook ... 1950*, vol. II, p. 239.

[55] *Yearbook ... 1950*, vol. I, 53rd meeting, 23 June 1950, pp. 91-92.

[56] *Yearbook ... 1956*, vol. II, p. 115.

43. In 1962, following the first report by Sir Humphrey Waldock,[57] the Commission elaborated on this theme:

> "Reservations, which must be in writing, may be formulated:
>
> (i) Upon the occasion of the adoption of the text of the treaty, either on the face of the treaty itself or in the final act of the conference at which the treaty was adopted, or in some other instrument drawn up in connection with the adoption of the treaty;
>
> (ii) Upon signing the treaty at a subsequent date; or
>
> (iii) Upon the occasion of the exchange or deposit of instruments of ratification, accession, acceptance or approval, either in the instrument itself or in a *procès-verbal* or other instrument accompanying it."[58]

This provision was hardly discussed by the members of the Commission.[59]

44. In conformity with the position of two Governments,[60] which had suggested "some simplification of the procedural provisions",[61] the Special Rapporteur made a far more restrained drafting proposal on second reading, namely:

> "A reservation must be in writing. If put forward subsequently to the adoption of the text of the treaty, it must be notified to the depositary or, where there is no depositary, to the other interested States."[62]

This draft is the direct source of article 23, paragraph 1, of the Vienna Conventions.

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[57] Under his proposal for draft article 17, paragraph 3 (a): "Reservations shall be formulated in writing either:
(i) On the face of the treaty itself and normally in the form of an adjunct to the signature of the representative of the reserving State;
(ii) In a Final Act of a conference, protocol, *procès-verbal* or other instrument related to the treaty and executed by a duly authorized representative of the reserving State;
(iii) In the instrument by which the reserving State ratifies, accedes to or accepts the treaty, or in a *procès-verbal* or other instrument accompanying the instrument of ratification, accession or acceptance and drawn up by the competent authority of the reserving State" (*Yearbook ... 1962*, vol. II, p. 60). In his commentary Waldock restricts himself to saying that this provision "does not appear to require comment" (ibid., p. 66).

[58] Draft article 18, para. 2 (a), ibid., p. 176; for the commentary on this provision, see ibid., p. 180 and the fifth report on reservations to treaties (A/CN.4/508/Add.3), para. 239.

[59] See the fifth report, ibid., para. 237; however, see para. 47 below.

[60] Denmark and Sweden (cf. the fourth report on the law of treaties by Sir Humphrey Waldock, *Yearbook ... 1965*, vol. II, pp. 46 and 47); see also para. 51 below.

[61] Ibid., p. 53, para. 13.

[62] Draft article 20, para. 1, ibid.

45. While the wording was changed, neither the Commission[63] nor the Vienna Conference of 1968-1969[64] ever called into question the need for reservations to be formulated in writing. And neither Paul Reuter, Special Rapporteur on the law of treaties between States and international organizations or between two or more international organizations, nor the participants in the Vienna Conference of 1986 added clarifications or suggested any changes in this regard.[65] The *travaux préparatoires* thus show remarkable unanimity in this respect.

46. This is easily explained. It has been written that:

> "Reservations are formal statements. Although their formulation in writing is not embraced by the term of the definition, it would according to article 23 (1) of the Vienna Convention seem to be an absolute requirement. It is less common nowadays that the various acts of consenting to a treaty occur simultaneously, therefore it is not possible for an orally presented reservation to come to the knowledge of all contracting parties. In the era of differentiated treaty-making procedures it becomes essential for reservations to be put down in writing in order to be registered and notified by the depository, so that all interested States would become aware of them. A reservation not notified cannot be acted upon. Other States would not be able to expressly accept or object to such reservations."[66]
>
> (Les réserves sont des déclarations formelles. Bien que leur formulation par écrit ne soit pas incluse dans leur définition même, elle apparaît, conformément aux dispositions de l'article 23, paragraphe 1, de la Convention de Vienne, comme une exigence catégorique. Il est inhabituel aujourd'hui que les différents actes de consentement au traité interviennent simultanément et il est dès lors exclu qu'une réserve présentée oralement parvienne à la connaissance de toutes les parties contractantes. À une époque où les procédures d'élaboration sont éclatées, il devient essentiel que les réserves soient couchées par écrit de façon à être enregistrées et notifiées par le dépositaire, de telle manière que tous les États intéressés en soient avertis. On ne peut prendre acte d'une réserve non notifiée et les autres États se trouveraient dans l'incapacité d'accepter expressément une telle réserve ou d'y objecter.)

47. Nonetheless, during the 1962 discussions, Waldock, replying to a question raised by Mr. Tabibi, did not totally exclude the idea of "oral reservations". He thought, however, that the question "belonged rather to the question of reservations

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[63] See the final draft text in *Yearbook ... 1966*, vol. II, p. 208 (draft article 18, para. 1).

[64] See the report of the Committee of the Whole, *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions*, Vienna, 26 March-24 May 1968 and 9 April-22 May 1969, *Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), document A/CONF.139/14, pp. 138-139, paras. 190-196.

[65] See the fifth report on reservations to treaties, A/CN.4/508/Add.3, para. 242.

[66] Frank Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, T.M.C. Asser Institute, The Hague, 1988, p. 44; see also Liesbeth Lijnzaad, *Reservations to UN Human Rights Treaties: Ratify and Ruin*, Martinus Nijhoff, 1994, p. 50.

at the time of the adoption of the treaty, which was dealt with in subparagraph 2 (a) (i)" and that in any case, the requirement of a formal confirmation "should go a long way towards disposing of the difficulty".[67]

48. Ultimately, it hardly matters how reservations are formulated at the outset, if they must be formally confirmed at the moment of the definitive expression of consent to be bound. That is undoubtedly how article 23, paragraph 1, of the 1969 and 1986 Vienna Conventions should be interpreted in the light of the *travaux préparatoires*: a reservation need be in writing only when formulated definitively, namely:

- When signing a treaty where the treaty makes express provision for this,[68] or if it is an agreement in simplified form;[69] and
- In all other cases, where the State or international organization expresses its definitive consent to be bound.[70]

49. These conclusions are not strictly in conformity with the letter of the text of article 23, paragraph 1, of the Vienna Conventions, which does not recognize such a distinction. In order to avoid giving the impression of rewriting the text, the Commission could perhaps simply restate it in a draft guideline 2.2.1 and explain, in a draft guideline 2.2.2, that the formal confirmation of a reservation should also be in writing, where necessary:

2.1.1 *Written form*

A reservation must be formulated in writing.

2.1.2 *Form of formal confirmation*

When formal confirmation of a reservation is necessary, it must be made in writing.

50. The Special Rapporteur is aware that this type of approach would seem to exclude the possibility of an exclusively oral initial formulation, even though there is no real drawback to making such formulations. The question could perhaps be left open. As was very aptly pointed out by Waldock,[71] the answer has no practical impact: a contracting party can in any event formulate a reservation up to the date of its expression of consent to be bound; thus, even if its initial oral statement could not be regarded as a true reservation, the "confirmation" made in due course would serve as a formulation.

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[67] *Yearbook ... 1962*, vol. I, 663rd meeting, 18 June 1962, para. 34, p. 223. See also a remark made by Brierly in 1950: "Mr. Brierly agreed that a reservation must be presented formally, but it might be announced informally during negotiations" (*Yearbook ... 1950*, vol. I, p. 91, para. 19).

[68] See draft guideline 2.2.4, fifth report (A/CN.4/508/Add.3), para. 264.

[69] See draft guideline 2.2.3 (ibid., para. 260).

[70] See draft guidelines 2.2.1 and 2.2.2.

[71] See para. 47 above.

51. The question also arises as to whether other clarifications are necessary. It is all the more legitimate in that, in the draft articles on the law of treaties adopted on first reading, the Commission incorporated quite a number of clarifications regarding the instrument in which the reservation should appear.[72] And while these clarifications were omitted in the final draft, that was, as Sweden noted, because they were "procedural rules which would fit better into a code of recommended practices",[73] which is precisely the function of the Guide to Practice.

52. After careful consideration, however, the Special Rapporteur has concluded that it is not useful, with one exception, to include the clarifications which appeared in draft article 17, paragraph 3 (a), of 1962;[74] the long list of instruments in which reservations may appear does not add much, particularly since the list is not restrictive, as is indicated by the reference in two places to an instrument other than those expressly mentioned.

53. On one point, however, clarification is needed. This concerns the author of the instrument in question.

54. As the Commission specified in the 1962 draft, a reservation must be formulated by:

– "The representative of the reserving State", at the time of signature;

– "A duly authorized representative of the reserving State"; or

– "The competent authority of the reserving State."[75]

This, in reality, amounts to saying the same thing three times; but it is not quite sufficient, because the question is whether there are rules of general international law to determine in a restrictive manner which authority or authorities are competent to formulate a reservation at the international level or whether this determination is left to the domestic law of each State.

55. In the opinion of the Special Rapporteur, the answer to this question may be deduced both from the general framework of the Vienna Conventions and from the practice of States and international organizations in this area.

56. By definition, a reservation has the purpose of modifying the legal effect of the provisions of a treaty in the relations between the parties; although it appears in an instrument other than the treaty, the reservation is therefore part of the corpus of the

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[72] See para. 43 above. Similar clarifications are found in the *Summary of the practice of the Secretary-General as depositary of multilateral treaties* prepared by the Treaty Section of the United Nations Office of Legal Affairs in 1959 (ST/LEG/7, para. 57):

"In practice, the Secretary-General, in the exercise of his functions as depositary, has always considered that reservations submitted at the time of signature must either be entered in the space reserved on the original for signatures, and above the signature, or be set forth in a separate document signed by the plenipotentiary; if the reservation is made at the time of ratification or accession, it must be inserted in the instrument or appear in an annexed document emanating from the authorities which drew up the instrument. Otherwise, at the time of deposit of the instrument, the representative of the Government concerned, duly authorized for that purpose, signs a *procès-verbal*, a certified copy of which is addressed to the States concerned."

It is perhaps significant that these clarifications were omitted in 1994 (cf. ST/LEG/8, United Nations publication, Sales No. E.94.V.15 — see, in particular, para. 161, p. 49).

[73] Fourth report on the law of treaties by Sir Humphrey Waldock, *Yearbook ... 1965*, vol. II, p. 47.

[74] Cited in para. 43 above.

[75] See the full text, para. 43, above.

treaty and has a direct influence on the respective obligations of the parties. It leaves intact the *instrumentum* (or *instrumenta*) which constitute the treaty, but it directly affects the *negotium*. In this situation, it seems logical and inevitable that reservations should be formulated under the same conditions as the consent of the State or international organization to be bound. And this is not an area in which international law is based entirely on domestic laws.

57. Article 7 of the 1969 and 1986 Vienna Conventions contains precise and detailed provisions on this point which undoubtedly reflect positive law on the subject.[76] In the words of the 1986 Convention:

> "1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if:
>
> (a) That person produces appropriate full powers; or
>
> (b) It appears from practice or from other circumstances that it was the intention of the States and international organizations concerned to consider that person as representing the State for such purposes without having to produce full powers.
>
> "2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State:
>
> (a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty (...);
>
> (b) Representatives accredited by States to an international conference, for the purpose of adopting the text of a treaty (...);
>
> (c) Representatives accredited by States to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that organization or organ;
>
> (d) Heads of permanent missions to an international organization, for the purpose of adopting the text of a treaty between the accrediting States and that organization.
>
> "3. A person is considered as representing an international organization for the purpose of adopting or authenticating the text of a treaty, or expressing the consent of that organization to be bound by a treaty if:
>
> (a) That person produces appropriate full powers; or
>
> (b) It appears from the circumstances that it was the intention of the States and international organizations concerned to consider that person as representing the organization for such purposes, in accordance with the rules of the organization, without having to produce full powers."

58. Mutatis mutandis, these rules, for the reasons indicated above, may certainly be transposed to the competence to formulate reservations, on the understanding, of course, that the formulation of reservations by a person who cannot "be considered (...) as authorized to represent a State or an international organization for

[76] See, however, para. 63 below.

that purpose is without legal effect unless afterwards confirmed by that State or that organization".[77]

59. Moreover, these restrictions on the competence to formulate reservations at the international level have been broadly confirmed in practice.

60. In an aide-memoire of 1 July 1976, the United Nations Legal Counsel said:

> "A reservation must be formulated in writing (article 23, paragraph 1, of the [1969 Vienna] Convention), and both reservations and withdrawals of reservations must emanate from one of the three authorities (Head of State, Head of Government or Minister for Foreign Affairs) competent to bind the State internationally".[78]

61. Similarly, the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties* prepared by the Treaty Section of the United Nations Office of Legal Affairs confines itself to noting that "the reservation must be included in the instrument or annexed to it and must emanate from one of the three qualified authorities" and to referring to general developments concerning the "deposit of binding instruments"[79] Likewise, according to this document, "Reservations made at the time of signature must be authorized by the full powers granted to the signatory by one of the three qualified authorities or the signatory must be one of these authorities".[80]

62. These rules seem to be strictly applied; all the instruments of ratification (or equivalents) of treaties containing reservations for which the Secretary-General is depositary and which the Special Rapporteur was able to consult with the help of the Treaty Section of the United Nations Office of Legal Affairs are signed by one of the "three authorities" and, if they are signed by the permanent representative, the latter has attached full powers emanating from one of these authorities. Moreover, it

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[77] Cf. article 8 of the 1969 and 1986 Vienna Conventions.

[78] *United Nations Juridical Yearbook 1976*, p. 211, para. 7.

[79] ST/LEG/8, United Nations publication, Sales No. E.94.V.15 (hereinafter referred to as *Summary of Practice* ... (ST/LEG/8), p. 49, para. 161; this passage refers to paras. 121 and 122, ibid., p. 36.

[80] Ibid., p. 62, para. 208; refers to chap. VI of the *Summary* ("Full powers and signatures").

was explained to the Special Rapporteur that where this was not the case, the permanent representative was requested, informally but firmly, to make this correction.[81]

63. The question arises, however, whether this practice, which transposes to reservations the rules contained in article 7 of the Vienna Conventions, referred to above,[82] is not excessively rigid. We might, for example, ask whether it would not be legitimate to accept that the accredited representative of a State to an international organization which is the depositary of the treaty to which the State that he represents wishes to make a reservation should be authorized to make that reservation. The issue is particularly relevant because this practice is accepted in international organizations other than the United Nations.

64. Thus it seems, for example, that the Secretary-General of the Organization of American States (OAS) accepts that reservations of member States may be transmitted to him by their permanent representatives to the organization. This practice is in conformity with the provisions of article VII of the 1928 Havana Convention on the Pan American Union, on treaties (not yet entered into force), which provides that all instruments relating to the expression of consent to be bound by treaties concluded at the International Conferences of American States shall be deposited "by the respective representative on the Governing Board, ... without need of special credentials for the deposit of the ratification".[83] Likewise, in the Council of Europe, many reservations appear to have been "recorded" in letters from permanent representatives.[84]

65. We might also consider that the rules applying to States should be transposed more fully to international organizations than they are in article 7, paragraph 2, of the 1986 Vienna Convention and, in particular, that the head of the secretariat of an international organization or its accredited representatives to a State or another organization should be regarded as having competence ipso facto to bind the organization.

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[81] This is confirmed, by analogy, by the procedural incident between India and Pakistan that came before the International Court of Justice in the recent *Aerial Incident of 10 August 1999* case. Oral pleadings revealed that in an initial communication dated 3 October 1973, the Permanent Mission of Pakistan to the United Nations gave notification of that country's intent to succeed British India as a party to the General Act of Arbitration of 1928. In a note dated 31 January 1974, the Secretary-General requested that such notification should be made "in the form prescribed", in other words, that it should be transmitted by one of the three authorities mentioned above; this notification took the form of a new communication (formulated in different terms than that of the preceding year), dated 30 May 1974 and signed this time by the Pakistani Prime Minister (see the pleadings by Sir Elihu Lauterpacht on behalf of Pakistan, 5 April 2000, CR/2000/3, and by A. Pellet on behalf of India, 6 April 2000, CR/2000/4). While this episode concerned a notification of succession and not the formulation of reservations, it testifies to the great vigilance with which the Secretary-General applies the rules set forth above (para. 61) with regard to the general expression by States of their consent to be bound by a treaty.

[82] Para. 57.

[83] Cf. the reply by OAS in "Depositary practice of States and international organizations in relation to reservations", report of the Secretary-General submitted pursuant to General Assembly resolution 1452 B (XIX), document A/5687, reproduced in *Yearbook ... 1965*, vol. II, p. 84.

[84] Cf. the *European Treaty Series*, No. 24.

66. The Special Rapporteur considers that the recognition of such limited extensions to competence for the purpose of formulating reservations would constitute a limited but welcome progressive development. He does not, however, propose to include them in the Guide to Practice. There is a consensus in the Commission, consistently approved by a large majority of States, "that there should be no change in the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions".[85] However, even if the provisions of article 7 of the 1969 and 1986 Conventions do not expressly deal with the competence to formulate reservations, they are nonetheless rightfully[86] regarded as transposable to this case.

67. On the other hand, it may be necessary to adopt a sufficiently flexible draft guideline which, while referring to the rules in article 7, maintains the less rigid practice followed by international organizations other than the United Nations as depositaries;[87] this can be done by including an "escape clause" in the relevant draft guideline.

68. The latter can be formulated in two ways:[88] either we confine ourselves to indicating that the authorities competent to formulate reservations at the international level are the same as those having competence to adopt or authenticate the text of a treaty or to express the consent of the State or the international organization to be bound, or the draft guideline adapts the text of article 7 of the 1986 Vienna Convention. Each of these solutions has its merits: the first, that of restraint; the second, that of convenience for users. The Special Rapporteur's preference tends towards the latter.

69. In the first case, the draft guideline might read as follows:

[**2.1.3** *Competence to formulate a reservation at the international level*

Subject to the customary practices in international organizations which are depositaries of treaties, any person competent to represent a State or an international organization for the purpose of adopting or authenticating the text of a treaty or expressing the consent of a State or an international organization to be bound by a treaty is competent to formulate a reservation on behalf of such State or international organization.]

70. Under the second hypothesis, draft guideline 2.1.3 might be drafted as follows:

[**2.1.3** *Competence to formulate a reservation at the international level*

1. Subject to the customary practices in international organizations which are depositaries of treaties, a person is competent to formulate a reservation on behalf of a State or an international organization if:

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[85] *Yearbook ... 1995*, vol. II (Part Two), para. 487.

[86] See para. 56 above.

[87] See para. 64 above. The International Telecommunication Union (ITU) is also a special case in this regard, but in a different sense and for different reasons, since reservations to texts equivalent to treaties adopted by that body "can be formulated only by delegations, namely, *during conferences*" (reply by ITU to the Commission's questionnaire on reservations — emphasis in text). The Special Rapporteur has no knowledge of the practices followed by depositary States.

[88] The Special Rapporteur considers that a third possibility, i.e., simply referring to article 7 of the Vienna Conventions, should be firmly ruled out; for reasons of convenience (and legal logic), the Guide to Practice should be self-sufficient.

(a) That person produces appropriate full powers for the purposes of adopting or authenticating the text of the treaty with regard to which the reservation is formulated or expressing the consent of the State or organization to be bound by the treaty; or

(b) It appears from practice or other circumstances that it was the intention of the States and international organizations concerned to consider that person as competent for such purposes without having to produce full powers.

2. By virtue of their functions and without having to produce full powers, the following are competent to formulate a reservation at the international level on behalf of a State:

(a) Heads of State, Heads of Government and Ministers for Foreign Affairs;

(b) Representatives accredited by States to an international conference for the purpose of formulating a reservation to a treaty adopted at that conference;

(c) Representatives accredited by States to an international organization or one of its organs, for the purpose of formulating a reservation to a treaty adopted by that organization or body;

[(d) Heads of permanent missions to an international organization, for the purpose of formulating a reservation to a treaty between the accrediting States and that organization).]

71. In this second case, however, paragraph 2 (d) could probably be omitted, as the hypothesis envisaged is marginal; it might perhaps be sufficient to mention it in the commentary.

72. It is self-evident that the international phase of formulating reservations is only the tip of the iceberg; as is true of the entire procedure whereby a State or an international organization expresses its consent to be bound, it is the outcome of an internal process that may be quite complex. Like the ratification procedure (or the acceptance, approval or accession procedure), from which it is indissociable, the formulation of reservations is a kind of "internal parenthesis" within an overwhelmingly international process.[89]

73. As Paul Reuter has noted, "national constitutional practices with regard to reservations and objections change from one country to the next",[90] and to describe them, however, briefly, would be beyond the scope of this report. At best it can be noted that, of the 22 States which replied to the Commission's questionnaire on reservations to treaties[91] and whose answers to questions 1.7, 1.7.1, 1.7.2, 1.8, 1.8.1

[89] Cf. Patrick Daillier and Alain Pellet, *Droit international public (Nguyen Quoc Dinh)*, Librairie générale de droit et de jurisprudence, Paris, 6th ed., 1999, p.144.

[90] *Introduction au droit des traités*, third edition, revised and enlarged by Philippe Cahier, PUF, Paris, 1995, para. 133*, pp. 84-85.

[91] See the fifth report on reservations to treaties, A/CN.4/508, paras. 3 and 4.

and 1.8.2[92] are utilisable,[93] competence to formulate a reservation belongs to: the executive branch alone in six cases;[94] the Parliament alone in five cases;[95] and it is shared between them in 12 cases.

74. In this last hypothesis, there are various modalities for collaboration between the executive branch and the Parliament. In some cases, the Parliament is merely kept informed of intended reservations[96] — although not always systematically.[97] In others, it must approve all reservations before their formulation[98] or, where only certain treaties are submitted to the Parliament, only those which relate to those treaties.[99] Moreover, a judicial body may be called upon to intervene in the internal procedure for formulating reservations.[100]

75. It is interesting to note that the procedure for formulating reservations does not necessarily follow the one generally required for the expression of the State's consent to be bound. Thus, in France, it is only recently that the custom was established of transmitting to the Parliament the text of reservations which the President of the Republic or the Government intends to attach to the ratification of treaties or the approval of agreements, even where such instruments must be submitted to the Parliament under article 53 of the 1958 Constitution.[101]

76. The diversity which characterizes the competence to formulate reservations and the procedure to be followed for that purpose among States seems to be mirrored among international organizations. Only two of them[102] answered

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[92] Question 1.7: "At the internal level, which authority or authorities decide(s) that the State will formulate a reservation: The Head of State? The Government or a government body? The Parliament?"; question 1.7.1: "If it is not always the same authority which has competence to decide that a reservation will be formulated, on what criteria is this based?"; question 1.7.2: "If the decision is taken by the Executive, is the Parliament: Informed of the decision? A priori or a posteriori? Invited to discuss the text of the intended reservation(s)?"; question 1.8: "Is it possible for a national judicial body to oppose or insist on the formulation of certain reservations?"; question 1.8.1: "If so, which authority and how is it seized of the matter?"; question 1.8.2: "What reason(s) can it invoke in taking such a decision?".

[93] Unfortunately, several of the 33 States which replied to the questionnaire gave incomplete answers.

[94] Bolivia (the Parliament can suggest reservations), Colombia (for certain treaties), Croatia (the Parliament can oppose a proposed reservation, which would imply that it is consulted), Denmark, the Holy See and Malaysia. See also the States mentioned in notes 96 and 97 below.

[95] Colombia (for certain treaties), Estonia, Slovenia, San Marino, Switzerland (but the proposal is generally made by the Federal Council), unless the Federal Council has its own competence.

[96] Kuwait since 1994 (consultation of an ad hoc commission); New Zealand "until recently" (system provisionally established).

[97] France (if the rapporteurs of the Parliamentary Assemblies so request and as a mere "courtesy"), Israel, Japan (if the treaty does not contain a reservation clause), Sweden (the "outlines" of reservations are transmitted to Parliament, never their exact text).

[98] Argentina and Morocco.

[99] Finland, Republic of Korea, Slovakia and Spain.

[100] Colombia, Finland and Malaysia.

[101] Cf. Alain Pellet, commentary on article 53, in François Luchaire and G. Conac, ed. dirs., *La Constitution de la République française*, Paris, Economica, 2nd ed., 1987, pp. 1047-1050.

[102] This is explained by the fact that international organizations are parties to treaties much more rarely than States and that, where they are parties, they generally do not formulate reservations. The sole exception concerns the European Communities which, regrettably, have not replied to the questionnaire to date.

questions 3.7, 3.7.1 and 3.7.2 of the questionnaire on reservations:[103] the Food and Agriculture Organization of the United Nations (FAO) states that such competence belongs to the Conference, while the International Civil Aviation Organization (ICAO), while emphasizing the lack of real practice, believes that if a reservation were formulated on its behalf, it would be formulated by the Secretary-General as an administrative matter and, as the case may be, by the Assembly or the Council in their respective areas of competence,[104] with the stipulation that it would be "appropriate" for the Assembly to be informed of the reservations formulated by the Council or by the Secretary-General.

77. In the view of the Special Rapporteur, the only conclusion that can be drawn from these observations is that international law does not impose any specific rule with regard to the internal procedure for formulating reservations. This, to be frank, seems so obvious that it hardly seems worthwhile to stipulate it expressly in a draft guideline of the Guide to Practice. If, however, the Commission holds a contrary view (which can be defended in the light of the pragmatic character of the Guide to Practice), the following type of guideline could be adopted:

> [**2.1.3 bis** *Competence to formulate a reservation at the internal level*
>
> *The determination of the competent body and the procedure to be followed for formulating a reservation at the internal level is a matter for the internal law of each State or international organization.*]

78. However, the freedom of States and international organizations to determine the authority competent to decide that a reservation will be formulated, and the procedure to be followed in formulating it raises problems similar to those arising from the same freedom the parties to a treaty have with respect to the internal procedure for ratification: what happens if the internal rules are not followed?

79. In the 1986 Vienna Convention, article 46 on the "provisions of internal law of a State and rules of an international organization regarding competence to conclude treaties", provides that:

> "1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
>
> 2. An international organization may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of the rules of the organization regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance.

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[103] Question 3.7: "At the internal level, which organ(s) decide(s) that the State will formulate a reservation: The chief executive officer? The general assembly? Another organ?"; question 3.7.1: "If it is not always the same organ that has competence to decide that a reservation will be formulated, on what criteria is this competence based?"; question 3.7.2: "If the decision is taken by the chief executive officer, is the general assembly: Informed of the decision? A priori or a posteriori? Invited to discuss the text of the intended reservation(s)?".

[104] Cf. articles 49 and 50 of the Chicago Convention on International Civil Aviation of 1944, which established ICAO.

3. A violation is manifest if it would be objectively evident to any State or any international organization conducting itself in the matter in accordance with the normal practice of States and, where appropriate, of international organizations and in good faith."

80. In the absence of practice, it is difficult to take a categorical position on the transposition of these rules to the formulation of reservations. Some elements argue in its favour: as discussed above, the formulation of reservations cannot be dissociated from the procedure for expressing definitive consent to be bound; it occurs or must be confirmed at the moment of expression of consent to be bound and, in almost all cases, emanates from the same authority. In the opinion of the Special Rapporteur, however, these arguments are not decisive. Whereas the internal rules on competence to conclude treaties are laid down in the constitution, at least in broad outline, that is not the case for the formulation of reservations, which derives from practice, and practice not necessarily in line with that followed when expressing consent to be bound.

81. That being so, it is unlikely that a violation of internal provisions can be "manifest" in the sense of article 46 cited above, and one must fall back on international rules like those set forth in draft guideline 2.1.3.[105] The conclusion to be drawn is that a State or an international organization should never be allowed to claim that a violation of the provisions of internal law or of the rules of the organization has invalidated a reservation that it has formulated, if such formulation was the act of an authority competent at the international level.

82. Since this conclusion differs from the rules applicable to "defective ratification" as set forth in article 46, it seems essential to state it expressly in a draft guideline, which might read as follows:

2.1.4 *Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations*

A State or an international organization may not invoke the fact that a reservation has been formulated in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for formulating reservations as invalidating the reservation.

(b) Form of interpretative declarations

83. In view of the lack of any provision on interpretative declarations in the Vienna Conventions and the scarcity or relative uncertainty of practice with regard to such declarations, they cannot be considered in isolation. We can hardly proceed except by analogy with (or in contrast to) reservations, taking great care, of course, to distinguish conditional interpretative declarations from those that are not conditional.[106]

84. With respect to conditional interpretative declarations, there is hardly any prima facie reason to depart from the rules of form and procedure applicable to the formulation of reservations; by definition, the State or international organization

[105] See paras. 69 and 70 above.

[106] On the distinction, see draft guidelines 1.2 and 1.2.1 and their commentary (*Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), chap. IV, C, 2, pp. 223-249).

formulating such declarations subjects its consent to be bound to a specific interpretation.[107] The reasons that make it necessary for reservations to be formulated in writing and authenticated by a person empowered to engage the State or the international organization are equally valid here. Since conditional interpretative declarations are indissociably linked to the consent of their author to be bound, they must be known to the other parties against whom they may be invoked, since they purport to produce effects on the treaty relations.

85. Draft guidelines 2.1.1, 2.1.2 and 2.1.3 may therefore simply be transposed to the formulation of conditional interpretative declarations, i.e., they must be formulated in writing by a person competent to represent the State or the international organization formulating the reservation with regard to the expression of consent to be bound by a treaty, and the same rules should apply if the interpretative declaration is subject to formal confirmation under the conditions stated in draft guideline 2.4.4.[108]

86. For the reasons outlined in paragraphs 270 and 271 of his fifth report, the Special Rapporteur believes that it would be preferable to state the applicable rules expressly (even if they are the same as those that apply to reservations), rather than refer to the draft guidelines on reservations; however, their wording could be simplified, as the Commission is not obliged to restate the provisions of the Vienna Conventions word for word, for there are none on this topic. Nevertheless, since all interpretative declarations must be formulated by an authority competent to engage the State,[109] there would appear to be no need to repeat that rule specifically in connection with conditional declarations.

87. In the light of these observations, a single draft guideline could combine the substance of the provisions contained in draft guidelines 2.1.1, 2.1.2 and 2.1.3, as follows:[110]

> **2.4.2** *Formulation of conditional interpretative declarations*
>
> ***A conditional interpretative declaration must be formulated in writing. Where necessary, formal confirmation of a conditional interpretative declaration must be effected in the same manner.***

88. A very different problem arises with regard to interpretative declarations purporting to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions, without subjecting its consent to be bound to that interpretation. The author of the declaration is taking a position[111] but is not attempting to make it binding on the other contracting parties. Hence it is not essential for such declarations to be in writing, as it is in the case of conditional interpretative declarations and reservations. It is certainly preferable that they

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[107] See draft guideline 1.2.1.

[108] See the fifth report on reservations to treaties, A/CN.4/508/Add.3, para. 272.

[109] See para. 90 below.

[110] This draft guideline could be supplemented by a stipulation concerning the need to communicate conditional interpretative declarations to the other interested States and international organizations; in this regard see para. 133 below.

[111] One which can have "considerable probative value" when it contains "recognition by a party of its own obligations under an instrument" (cf. International Court of Justice, "Advisory Opinion of 11 July 1950 concerning the International Status of South-West Africa", *I.C.J. Reports 1950*, pp. 135-136; see the commentary on draft guideline 1.2.1. in *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), note 317, p. 236).

should be known to the other parties, but ignorance of them would not necessarily void them of all legal consequences. Moreover, the oral formulation of such declarations is not uncommon, and has not kept judges or international arbitrators from recognizing that they have certain effects.[112]

89. It goes without saying, however, that an interpretative declaration can produce such effects only if it emanates from an authority competent to engage the State. And since the declaration purports to produce effects in relation to a treaty, it would seem appropriate to limit the option of formulating it to the authorities competent to engage the State at the international level through a treaty.

90. There is no need for a draft guideline on the form that simple interpretative declarations may take, since the form is unimportant. The silence of the Guide to Practice on that point should make it sufficiently clear. The draft guideline on competence to formulate an interpretative declaration should be modelled on the one concerning reservations:

> **2.4.1** *Formulation of interpretative declarations*
>
> ***An interpretative declaration must be formulated by a person competent to represent a State or an international organization for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State or international organization to be bound by a treaty.***

91. Moreover, the remarks that apply in the case of reservations also apply to the formulation of interpretative declarations at the internal level. National rules and practice are highly diverse in this regard.

92. This becomes clear from the replies of States to the Commission's questionnaire on reservations to treaties. Of the 22 States that replied to questions 3.5 and 3.5.1,[113]

- In seven cases, only the executive branch is competent to formulate a declaration;[114]
- In two cases, only the Parliament has such competence;[115] and
- In 13 cases, competence is shared between the two,[116] and the modalities for collaboration between them are as diverse as they are with regard to reservations.[117]

93. In general, the executive branch probably plays a more distinct role than it does in the case of reservations.

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[112] Ibid.

[113] Question 3.5: "At the internal level, what authority or authorities take(s) the decision to make such interpretative declarations?"; question 3.5.1: "Is the Parliament involved in the formulation of these declarations?". This list of States is not identical to the list of States that responded to similar questions on reservations.

[114] Chile, India, Israel, Italy, Japan, Malaysia and the Holy See.

[115] Estonia and Slovakia.

[116] Argentina, Bolivia, Croatia, Finland, France, Germany, Mexico, Panama, Slovenia, Spain, Sweden, Switzerland and the United States of America.

[117] See para. 74 above.

94. It follows a fortiori that the determination of competence to formulate interpretative declarations and the procedure to be followed in that regard is purely a matter for internal law, and that a State or an international organization would not be entitled to invoke a violation of internal law as invalidating the legal effect that its declarations might produce — especially since it appears that, in general, there is greater reliance on practice than on formal written rules. The Special Rapporteur's only doubt is whether a guideline is needed in this regard.

95. If the Commission believes that a draft guideline is needed, it might be worded as follows:

> [**2.4.1 bis** *Competence to formulate an interpretative declaration at the internal level*
>
> ***The determination of the competent body and the procedure to be followed for formulating an interpretative declaration at the internal level is a matter for the internal law of each State or international organization.***
>
> ***A State or international organization may not invoke the fact that an interpretative declaration has been formulated in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for formulating interpretative declarations as invalidating the declaration.***]

2. Publicity of reservations and interpretative declarations

96. Once it has been formulated, the reservation (or interpretative declaration) must be made known to the other States or international organizations concerned. Such publicity is essential for enabling the latter to react through either a formal acceptance or an objection.

97. Article 23 of the Vienna Conventions of 1969 and 1986 specifies the recipients of reservations formulated by a State or an international organization, but is silent on the procedure to be followed in effecting such notification, the burden of which is borne by the depositary in nearly all cases.

(a) Recipients of reservations and interpretative declarations

(i) Reservations

98. Under article 23, paragraph 1, of the 1986 Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, a reservation must be communicated "to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty". In addition, article 20, paragraph 3, which stipulates that a reservation to a constituent instrument requires "the acceptance of the competent organ" of the organization in order to produce effects, implies that the reservation must be communicated to the organization in question.

a. Reservations to treaties other than constituent instruments of international organizations

99. The first group of recipients (contracting States and contracting organizations) does not pose any particular problem. These terms are defined in article 2, paragraph 1 (f), of the 1986 Convention[118] as meaning, respectively:

> "(i) a State, or
>
> (ii) an international organization,
>
> which has consented to be bound by the treaty, whether or not the treaty has entered into force".

100. Much more problematic, in contrast, are the definition and, still more, the determination in each specific case of the "other States and international organizations entitled to become parties to the treaty". As has been noted, "[n]ot all treaties are wholly clear as to which other States may become parties".[119]

101. In his 1951 report on reservations to multilateral treaties, Brierly suggested the following provision:

> "The following classes of States shall be entitled to be consulted as to any reservations formulated after the signature of this convention (or after this convention has become open to signature or accession):
>
> "(a) States entitled to become parties to the convention,
>
> "(b) States having signed or ratified the convention,
>
> "(c) States having ratified or acceded to the convention".[120]
>
> (Les groupes d'États suivants sont en droit d'être consultés au sujet de toute réserve formulée après la signature de la présente convention: a) les États en droit de devenir parties à la convention; b) les États ayant signé ou ratifié la convention; c) les États ayant ratifié la convention ou y ayant accédé).

102. In conformity with these recommendations, the Commission suggested that, "in the absence of contrary provisions in any multilateral convention (...) The depositary of a multilateral convention should, upon receipt of each reservation, communicate it to all States which are or which are entitled to become parties to the convention".[121]

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[118] The French text reproduced in the publication *La Commission du Droit International et son oeuvre*, 5th edition (United Nations publication, Sales No. E.95.V.6), p. 416, contains an error whereby subparagraphs (e) and (f) are combined (not applicable to the English version). See also article 2, para. 1 (f), of the 1969 Convention and article 2, para. 1 (k), of the 1978 Vienna Convention on Succession of States in Respect of Treaties, which define the term "contracting State" in the same way.

[119] Sir Robert Jennings and Sir Arthur Watts, *Oppenheim's International Law, Ninth Edition*, vol. I, *Peace*, parts 2 to 4, London, Longman, 1992, p. 1248, note 4.

[120] *Yearbook ... 1951*, vol. II, p. 16. This puzzling formulation is explained by the fact that these are alternative model clauses.

[121] Report of the International Law Commission on the work of its third session (see *Yearbook ... 1951*, vol. II, document A/1858, para. 34, p. 130). This point was not extensively discussed; see, however, the statements by Hudson and Spiropoulos, the latter of whom considered that communication to States not parties to the Treaty was not an obligation under positive law (105th meeting, 18 June 1951, *Yearbook ... 1951*, vol. I, p. 198).

103. More vaguely, Lauterpacht, in his first report in 1953 proposed in three of the four alternative versions of draft article 9 on reservations a provision stating that "[t]he text of the reservations received shall be communicated by the depositary authority to all the interested States".[122] But he does not comment on this phrase,[123] which is reproduced in the first report by Fitzmaurice in 1956,[124] who clarifies it as follows in draft article 39: these are "all the States which have taken part in the negotiation and drawing up of the treaty or which, by giving their signature, ratification, accession or acceptance, have manifested their interest in it".[125]

104. Conversely, in 1962, Waldock reverted to the 1951 formulation[126] and proposed that any reservation formulated "by a State signing, ratifying, acceding to, or accepting a treaty subsequently to the meeting or conference at which it was adopted shall be communicated to all other States which are, or are entitled to become, parties ...".[127] This was also the formula adopted by the Commission after the Drafting Committee had considered it and made minor drafting changes.[128] While States had not expressed any objections, in this regard in their comments on the draft articles adopted on first reading, Waldock, with no explanations, proposed in 1965 to revert to the phrase "other States concerned",[129] which the Commission replaced by "contracting States"[130] on the ground that the notion of "States concerned"[131] was "very vague', finally adopting, in 1966, the requirement of communication "to the other States entitled to become parties to the treaty",[132] a phrase which was "regarded as more appropriate to describe the recipients of the type of communications in question".[133]

105. At the Vienna Conference, Mr. McKinnon pointed out, on behalf of the delegation of Canada, that that wording "might create difficulties for a depositary, as there was no criterion for deciding which were those States. It would therefore be

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[122] *Yearbook ... 1953*, vol. II, p. 92, alternatives B and C; oddly enough, this requirement does not appear in alternative A (acceptance of reservations by a two-thirds majority, ibid., p. 91).

[123] Ibid., p. 136.

[124] Draft article 37, *Yearbook ... 1956*, vol. II, p. 115: they "must be brought to the knowledge of the other interested States ...".

[125] Ibid.

[126] See paras. 101 and 102 above.

[127] First report on the law of treaties, *Yearbook ... 1962*, vol. II, p. 60. Not without reason, Waldock believed that it was unnecessary to notify the other States which took part in the negotiations of a reservation formulated "when signing a treaty at a meeting or conference of the negotiating States" if it appeared at the end of the treaty itself or in the final act of the conference (ibid.).

[128] Draft article 18, para. 3; see ibid., p. 176. In its commentary, the Commission considered that this phrase was equivalent to "other interested States" (ibid., p. 180).

[129] Fourth report, *Yearbook ... 1965*, vol. II, p. 56.

[130] Ibid., p. 162.

[131] Explanation given by Sir Humphrey Waldock at the 813th meeting, 29 June 1965, *Yearbook ... 1965*, vol. I, p. 267.

[132] Draft article 18, para. 1 (*Yearbook ... 1966*, vol. II, p. 208).

[133] Explanation given by Briggs, Chairman of the Drafting Committee, *Yearbook ... 1966*, vol. I, Part II, p. 293.

preferable to substitute the phrase 'negotiating States and contracting States' as proposed in his delegation's amendment (A/CONF.39/C.1/L.158)".[134] Although this common-sense proposal was submitted to the Drafting Committee,[135] the latter preferred an amendment submitted by Spain,[136] which appears in the final text of article 23, paragraph 1, of the 1969 Convention and which was reproduced in the 1986 text unchanged except for the addition of international organizations.[137]

106. Not only is the phrase adopted obscure, but the *travaux préparatoires* for the 1969 Convention do little to clarify it. The same is true of subparagraphs (b) and (e) of article 77, paragraph 1, which, while not referring expressly to reservations, provide that the depositary is responsible for transmitting "to the parties and to the States entitled to become parties to the treaty" copies of the texts of the treaty and informing them of "notifications and communications relating to the treaty";[138] however, the *travaux préparatoires* for these provisions shed no light on this phrase,[139] on which the Commission's members have never focused their attention.

107. This was not the case during the preparation of the 1986 Convention. Whereas the Special Rapporteur on the law of treaties between States and international organizations or between two or more international organizations had, in his fourth and fifth reports,[140] merely adapted without comment the text of article 23, paragraph 1, of the 1969 Convention, several members of the Commission expressed particular concern during the discussion of the draft in 1977 regarding the problems posed by the determination of "international organizations entitled to become parties to the treaty". For example, Ushakov observed that:

> "In the case of treaties of a universal character concluded between States and international organizations, such communications would thus have to be made to all existing States. For the same category of treaties and also treaties

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[134] *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna, 26 March-24 May 1968, summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.68.V.7), *23rd meeting of the Committee of the Whole, 11 April 1968*, p. 124, para. 38. Jochen A. Frowein points out that the United States of America had expressed the same concern in 1966 in the General Assembly's discussion of the International Law Commission's draft articles relating to depositaries (A/6309/Rev.1, p. 176) ("Some considerations regarding the function of the depositary — comments on art. 72, para. 1 (d), of the ILC's draft articles on the law of treaties", *ZaöRV* 1967, p. 533); see also Shabtai Rosenne, "More on the Depositary of International Treaties", *American Journal of International Law*, 1970, pp. 847-848.

[135] See *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), report of the Committee of the Whole, document A/CONF.39/14, p. 139, para. 194.

[136] Ibid., document A/CONF.39/C.1/L.149, para. 192 (i); for the text adopted, see ibid., para. 196.

[137] See para. 98 above.

[138] Under article 78, the depositary is also responsible for "informing the States entitled to become parties to the treaty when the number of signatures or of instruments of ratification, acceptance, approval or accession required for the entry into force of the treaty has been received or deposited".

[139] On the origin of these provisions, see, in particular, the 1951 report by Brierly, *Yearbook ... 1951*, vol. II, p. 27, and the conclusions of the Commission, ibid., p. 130, para. 34 (l); article 17, para. 4 (c), and article 27, para. 6 (c), of the draft proposed by Waldock in 1962, *Yearbook ... 1962*, vol. II, pp. 66 and 82-83, and article 29, para. 5, of the draft adopted by the Commission on first reading, ibid., p. 185; and draft article 72 adopted definitively by the Commission in 1966, *Yearbook ... 1966*, vol. II, p. 269.

[140] *Yearbook ... 1975*, vol. II, p. 38, and *Yearbook ... 1976*, vol. II (Part One), p. 146.

concluded between international organizations only, it would, however, be more difficult to determine what international organizations were 'entitled to become parties'. If 10 international organizations were parties to a treaty, to what other international organizations would the communications have to be sent?"[141]

108. For his part, Mr. Schwebel noted that "an international organization was entitled to become a party to a treaty if there was a link between the basic function for which it had been created and the object and purpose of the treaty".[142] This opinion was not shared by Reuter, who recalled that "the phrase 'entitled to become parties to the treaty'" had not been defined in the 1969 Convention, which "meant that entitlement to become party to a treaty concluded between States was necessarily determined by the treaty itself", as treaties which concerned all States should be open to all States, and the same would apply to international organizations.[143] Ushakov, who maintained his opposition to the wording adopted by the Drafting Committee, made a formal proposal in plenary meeting to limit communications concerning reservations to treaties between States and one or more international organizations[144] to the "contracting organizations" only; as this proposal was not supported, a decision was taken to record it in a footnote to the commentary,[145] and that was done.[146]

109. It is certainly regrettable that the limitations proposed by Canada in 1968[147] and by Ushakov in 1977 regarding the recipients of communications relating to reservations were not adopted (in the second case, probably out of a debatable concern with not deviating from the 1969 wording and not making any distinction between the rights of States and those of international organizations); such limitations would have obviated practical difficulties for depositaries without significantly calling into question the "useful" publicity of reservations among truly interested States and international organizations.[148]

110. There is obviously no problem when the treaty itself determines clearly which States or international organizations are entitled to become parties, at least in the case of "closed" treaties; treaties concluded under the auspices of a regional international organization such as the Council of Europe,[149] the Organization of

[141] *Yearbook ... 1977*, vol. I, 1434th meeting, 6 June 1977, p. 101, para. 42.

[142] Ibid., p. 102, para. 48; in the same vein, Verosta, ibid., p. 102, para. 45.

[143] Ibid., p. 102, para. 51; in the same vein, Calle y Calle, ibid., p. 102, para. 46.

[144] But not those concerning reservations to treaties between several international organizations.

[145] Ibid., 1451st meeting, 1 July 1977, p. 196.

[146] *Yearbook ... 1977*, vol. II, Part Two, p. 116.

[147] See para. 105 above.

[148] It is interesting to note that, while the specialized agencies of the United Nations are not, and are not entitled to become, "parties" to the 1947 Convention on the Privileges and Immunities of the Specialized Agencies, they do receive communications relating to the reservations formulated by some States with regard to its provisions. See, in particular, the *Summary of Practice ...* (ST/LEG/8), pp. 60-61, paras. 199-203.

[149] *See*, for instance, article K, para. 1, of the 3 May 1996 version of the European Social Charter: "This Charter shall be open for signature by the members of the Council of Europe"; or article 32, para. 1, of the Council of Europe Criminal Law Convention on Corruption of 27 January 1999.

American States[150] or the Organization of African Unity[151] generally fall into this category. Things are much more complicated when it comes to treaties that do not indicate clearly which States are entitled to become parties to them or "open" treaties containing the words "any State",[152] or when it is established that participants in the negotiations were agreed that later accessions would be possible.[153] This is obviously the case most particularly when depositary functions are assumed by a State which not only has no diplomatic relations with some States[154] but also does not recognize as States certain entities which proclaim themselves to be States.

111. The 1997 *Summary of practice of the Secretary-General as depositary of multilateral treaties* devotes an entire chapter to describing the difficulties encountered by the Secretary-General in determining the "States and international organizations which may become parties",[155] difficulties which legal theorists have largely underscored.[156] With regard to the depositary notifications of the Secretary-General of the United Nations which the Special Rapporteur has been able to consult, the Special Rapporteur has noted that open treaties limit themselves to indicating that "all States" are to be notified, without giving further details, while others list the member and non-member States to which notification is to be given, whether or not the latter States have observer status.[157] Curiously, States which replied on this point to the Commission's questionnaire on reservations to treaties do not mention any particular difficulties in this area, but this can probably be explained by the fact that the problem is not specific to reservations and more generally concerns depositary functions.

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[150] *See*, for example, article XXI of the Inter-American Convention against Corruption of 29 March 1996.

[151] *See*, for instance, article 12, para. 1, of the Lusaka Agreement on Cooperative Enforcement Operations Directed at Illegal Trade in Wild Fauna and Flora.

[152] *See*, for instance, article XIII of the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid: "The present Convention is open for signature by all States ..."; or article 84, para. 1, of the Vienna Convention of 1986: "The present Convention shall remain open for accession by any State, by Namibia (...) and by any international organization which has the capacity to conclude treaties". See also article 305 of the 1982 United Nations Convention on the Law of the Sea, which opens the Convention for signature by not only "all States" but also Namibia (before its independence) and self-governing States and territories.

[153] Cf. article 15 of the Vienna Conventions of 1969 and 1975.

[154] Cf. article 74 of the Vienna Conventions.

[155] Op. cit. (note 79 above), chap. V, pp. 21-30, paras. 73-100.

[156] See, inter alia, Jochen A. Frowein, "Some considerations regarding the function of the depositary — comments on art. 72, para. 1 (d), of the ILC's draft articles on the law of treaties", *ZaöRV* 1967, pp. 533-539, and Shabtai Rosenne, "More on the depositary of international treaties", *American Journal of International Law*, 1970, pp. 847-848.

[157] The 7 July 1997 notification concerning a reservation by Japan to the 28 August 1996 Agreement Establishing the Bank for Cooperation and Development in the Middle East and North Africa was also sent to the Permanent Observer Mission of Palestine which, under article 53 (a) of the Agreement, is entitled to become a party thereto.

112. That is also why the Special Rapporteur sees no merit in proposing the adoption of one or more draft guidelines on this point.[158]

113. By contrast, no matter how problematic and arguable the provision may be,[159] it is certainly necessary to reproduce in the Guide to Practice the rule set forth in article 23, paragraph 1, of the 1969 and 1986 Vienna Conventions (taking the latter in its broadest formulation), presumably adding that such communication must be made in writing and setting forth this general rule in a single draft guideline, together with a special rule on the communication of reservations to constituent instruments of international organizations.[160] The first paragraph of such a draft could be worded as follows:

2.1.5 *Communication of reservations* (first paragraph)

A reservation must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty.

114. This latter requirement is only implicit in the Vienna Convention, but it is clear from the context, since article 23, paragraph 1, is the provision which requires that reservations be formulated in writing[161] and which uses a very concise formula to link that condition to the requirement that reservations be communicated. Besides, when there is no depositary, the formulation and communication of reservations necessarily go hand in hand.[162] This, moreover, conforms to practice.[163]

b. The particular case of reservations to constituent instruments of international organizations

115. Article 23 of the 1969 and 1986 Vienna Conventions does not deal with the particular case of the procedure with regard to reservations to constituent instruments of international organizations. The general rule set forth in paragraph 1 of the article must, however, be clarified and expanded in this particular case.

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[158] The Special Rapporteur nevertheless acknowledges that his position poses a problem of general principle: must the Commission avail itself of the opportunity afforded by the drafting of the Guide to Practice in the area of reservations to try to solve general problems which arise with regard to reservations but also with regard to other aspects of the law of treaties? The Special Rapporteur proposes to answer this question pragmatically, answering "yes" if the solution of an unresolved problem will have an impact on the solution of an issue specific to reservations, and "no" in other cases. However, he would welcome any guidance which the Commission might give him in this regard.

[159] As the Special Rapporteur noted after the debates on his first report, there is "a consensus in the Commission that there should be no change in the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions" (*Yearbook ... 1995*, vol. II, Part Two, para. 487). There must therefore be compelling reasons for deviating from the Guide to Practice. No matter how unsatisfactory the Special Rapporteur may find the rule in article 23, para. 1, he does not think that this condition is met in the present instance.

[160] See para. 133 below: "A reservation to a treaty in force which is the constituent instrument of an international organization or creates a deliberative organ that has the capacity to accept a reservation must also be communicated to such organization or organ".

[161] *See* para. 40 above.

[162] *See* sect. (b) below.

[163] Cf. the "depositary notifications" of the Secretary-General of the United Nations.

116. According to article 20, paragraph 3:

> "When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization."

Now, that organ can take a decision only if the organization is aware of the reservation, which must therefore be communicated to it.

117. This problem was overlooked by the first three Special Rapporteurs on the law of treaties and taken up only by Waldock in his first report in 1962. He proposed a long draft article 17 on the "Power to formulate and withdraw reservations", paragraph 5 of which provided that:

> "However, in any case where a reservation is formulated to an instrument which is the constituent instrument of an international organization and the reservation is not one specifically authorized by such instrument, it shall be communicated to the Head of the secretariat of the organization concerned in order that the question of its admissibility may be brought before the competent organ of such organization."[164]

118. Waldock indicated that this clarification was motivated by:

> "a point to which attention is drawn in paragraph 81 of the *Summary of the Practice of the Secretary-General* (ST/LEG/7), where it is stated:
>
> > 'If the agreement should be a constitution establishing an international organization, the practice followed by the Secretary-General and the discussions in the Sixth Committee show that the reservation would be submitted to the competent organ of the organization before the State concerned was counted among the parties. The organization alone would be competent to interpret its constitution and to determine the compatibility of any reservation with its provisions'".[165]

119. This provision disappeared from the draft after its consideration by the Drafting Committee,[166] probably because the latter's members felt that the adoption of an express stipulation that the decision on the effect of a reservation to a constituent instrument must be taken by "the competent organ of the organization in question"[167] made that clarification superfluous. The question does not appear to have been raised again subsequently.

120. It is not surprising that Waldock asked the question in 1962: three years earlier, the problem had arisen critically in connection with a reservation by India to the Convention on the International Maritime Organization (IMO — formerly the Intergovernmental Maritime Consultative Organization (IMCO)). The Secretary-General of the United Nations, as depositary of the Convention, transmitted to IMCO the text of the Indian reservation, which had been made that same day on the opening of the first session of the IMCO Assembly. He suggested that the IMCO secretariat should refer the question to the IMCO Assembly for a decision. When

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[164] *Yearbook ... 1962*, vol. II (document A/CN.4/144, chap. II, art. 17, para. 5), p. 61.

[165] See ibid., para. (12) of the commentary on article 17, p. 66.

[166] See ibid., document A/5209, report of the International Law Commission to the General Assembly, draft article 18, pp. 175-176.

[167] Draft article 20, para. 4, ibid.

this referral was contested, the Secretary-General, in a well-argued report, maintained that "this procedure conformed (1) to the terms of the IMCO Convention; (2) to the precedents in depositary practice where an organ or body was in a position to pass upon a reservation; and (3) to the views on this specific situation expressed by the General Assembly during its previous debates on reservations to multilateral conventions".[168]

121. The Secretary-General stated, inter alia, that "in previous cases where reservations had been made to multilateral conventions which were in force and which either were constitutions of organizations or which otherwise created deliberative organs, the Secretary-General has invariably treated the matter as one for reference to the body having the authority to interpret the convention in question".[169] He cited as examples the communication to the World Health Assembly of the reservation formulated in 1948 by the United States of America to the Constitution of the World Health Organization[170] and the communication the following year of reservations made by the Union of South Africa and by Southern Rhodesia to the General Agreement on Tariffs and Trade (GATT) to the GATT Contracting Parties.[171] In the 1997 *Summary of Practice*, the Secretary-General gives another example of his consistent practice in this regard: "when Germany and the United Kingdom accepted the Agreement establishing the African Development Bank of 17 May 1979, as amended, they made reservations which had not been contemplated in the Agreement. The Secretary-General, as depositary, duly communicated the reservations to the Bank and accepted the deposit of the instruments only after the Bank had informed him that it had accepted the reservations".[172]

122. In view of the principle set forth in article 20, paragraph 3, of the Vienna Conventions and of the practice which normally appears to be followed,[173] it does seem appropriate to set forth in a draft guideline the obligation to communicate reservations to the constituent instrument of an international organization to the organization in question.

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[168] *Reservations to multilateral conventions: the Convention on the Intergovernmental Maritime Consultative Organization*, document A/4235, para. 18. *See* also on this incident Oscar Schachter, "The question of treaty reservations at the 1959 General Assembly", *American Journal of International Law*, 1960, pp. 372-379.

[169] A/4235, para. 21.

[170] See also Oscar Schachter, "Development of international law through the legal opinions of the United Nations Secretariat", *British Yearbook of International Law*, 1949, pp. 124-126.

[171] A/4235, para. 22.

[172] Op. cit. (note 79 above), p. 59, para. 198 — footnotes omitted. See also Frank Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, T. M. C. Asser Institute, The Hague, 1988, pp. 346-347.

[173] The Special Rapporteur must, however, admit that he is familiar only with the depositary practice of the Secretary-General of the United Nations. Nevertheless, he attaches particular importance to it because the Secretary-General is currently, without a doubt, the principal depositary of constituent instruments of other international organizations.

123. Three questions arise, however, with regard to the precise scope of this rule, the principle of which does not appear to be in doubt:

1. Should the draft guideline include the clarification (which was included in the 1962 Waldock draft[174]) that the reservation must be communicated to the head of the secretariat of the organization concerned?

2. Should it state that the same rule applies when the treaty is not, strictly speaking, the constituent instrument of an international organization, but creates a "deliberative organ" that may take a position on whether or not the reservation is lawful, as the Secretary-General had done in his 1959 *Summary of Practice*?[175]

3. Does the communication of a reservation to the constituent instrument of an international organization to the latter organization remove the obligation to also communicate the text of the reservation to interested States and international organizations?

124. On the first question, the Special Rapporteur is of the view that such a clarification is not necessary: even if, generally speaking, the communication will be addressed to the head of the secretariat, this may not always be the case because of the particular structure of a given organization. In the case of the European Communities, for example, the collegial nature of the Commission might suggest that such a communication should more logically be addressed to the Secretary-General of the organization.[176] Moreover, such a clarification has hardly any concrete value: what matters is that the organization in question be duly alerted to the problem.

125. On the question of whether the same rule should apply to "deliberative organs" created by a treaty which nonetheless are not international organizations in the strict sense of the term, it is very likely that in 1959 the drafters of the report of the Secretary-General of the United Nations had GATT in mind — especially since one of the examples cited related to that organization.[177] The problem no longer arises in that connection, since GATT has been replaced by the World Trade Organization (WTO). The fact remains, however, that certain treaties, especially in the field of disarmament or environmental protection, create deliberative bodies having a secretariat which have sometimes been denied the status of an international organization.[178] While the Special Rapporteur does not share this viewpoint, it would be useful perhaps to include this clarification in the Guide to Practice — on the understanding that it should also be included in the draft guideline(s) that will clarify the meaning of article 20, paragraph 3, of the Vienna Conventions. It would seem justifiable in fact to apply this same rule to reservations to constituent instruments *stricto sensu* and to reservations to treaties creating oversight bodies

[174] See para. 117 above.

[175] See para. 121 above.

[176] The Special Rapporteur once again regrets that the European Communities did not think it necessary to reply to the Commission's questionnaire on reservations to treaties.

[177] See para. 121 above.

[178] See, for example, Robin R. Churchill and Geir Ulfstein, "Autonomous institutional arrangements in multilateral agreements: a little-noticed phenomenon in international law", American Journal of International Law, 2000, No. 4, pp. 623-659; some authors also argue that the International Criminal Court is not, strictly speaking, an international organization.

that assist in the application of the treaty whose status as international organizations might be subject to challenge.

126. The reply to the last question is the trickiest. It is also the one that has the greatest practical significance, for a reply in the affirmative would impose a heavier burden on the depositary than a negative one. Moreover, the practice of the Secretary-General — which does not appear to be wholly consistent[179] — seems to tend rather in the opposite direction.[180] The Special Rapporteur nevertheless believes that a reservation to a constituent instrument should be communicated not only to the organization concerned but also to all other contracting States and organizations and to those entitled to become members thereof.

127. Two arguments are advanced in support of this position. The first is that it is by no means evident that an organization's acceptance of the reservation precludes member States (and international organizations) from objecting to it. The Special Rapporteur has no final position on the matter, which can be decided only after the Commission undertakes an in-depth study of whether or not it is possible to object to a reservation that is expressly provided for in a treaty. Even if there are good reasons to believe that this is not the case, it would seem premature to make such a claim. Secondly, there is a good practical argument to support this affirmative reply: even if the reservation is communicated to the organization itself, it is in fact its own member States (or international organizations) that will decide. It is therefore important for them to be aware of the reservation. A two-step procedure is a waste of time.

128. Lastly, it goes without saying that the obligation to communicate the text of reservations to a constituent instrument to the international organization concerned arises only if the organization exists, in other words, if the treaty is in force.[181] The question may nevertheless arise as to whether such reservations should not also be communicated before the effective creation of the organization to the "preparatory committees" (or whatever name they may be given) that are often established to prepare for the prompt and effective entry into force of the constituent instrument. Even if in many cases an affirmative reply again appears necessary, it would be difficult to generalize, since everything depends on the exact mandate that the

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[179] For an earlier example in which it appears that the Secretary-General communicated the reservation (of the United States of America to the Constitution of the World Health Organization) both to interested States and to the organization concerned, see Oscar Schachter, "Development of international law through the legal opinions of the United Nations Secretariat", *British Yearbook of International Law* 1948, p. 125. See also the *Summary of Practice ...* (ST/LEG/8), p. 51, para. 170.

[180] In at least one case, however, the State author of a unilateral declaration (which was tantamount to a reservation) — in this case, the United Kingdom — directly consulted the signatories to an agreement establishing an international organization, the Kingston Agreement of 18 October 1969 establishing the Caribbean Development Bank, about the declaration (cf. *Multilateral Treaties Deposited with the Secretary-General, status as at 31 December 2000* (United Nations publication, Sales No. E.01.V.5), vol. I, p. 482, note 8). The author of the reservation may also take the initiative to consult the international organization concerned (cf. the French reservation to the Agreement establishing the Asia-Pacific Institute for Broadcast Development, Kuala Lumpur, 12 August 1977 — ibid., vol. II, p. 298, note 3).

[181] If the treaty is not in force, according to the information that was kindly communicated to the Special Rapporteur by the Treaty Section of the United Nations Office of Legal Affairs, that is indeed the practice of the Secretary-General of the United Nations, who proceeds in this case as he would in respect of any other treaty.

conference that adopted the treaty gives to the preparatory committee. Moreover, the reference to "deliberative organs" established by a treaty seems to cover this possibility; the Special Rapporteur therefore does not propose to include it in the second paragraph which he proposes to add to draft guideline 2.1.5.

129. This second paragraph could read as follows:

> "*A reservation to a treaty in force which is the constituent instrument of an international organization or which creates a deliberative organ that has the capacity to accept a reservation must also be communicated to such organization or organ.*"

Draft guideline 2.1.5 in its entirety would therefore read as follows:

> "**2.1.5** *Communication of reservations*
>
> ***A reservation must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty.***
>
> ***A reservation to a treaty in force which is the constituent instrument of an international organization or which creates a deliberative organ that has the capacity to accept a reservation must also be communicated to such organization or organ.***"

(ii) Interpretative declarations

130. There seems to be no reason to transpose the rules governing the communication of reservations to simple interpretative declarations, which may be formulated orally;[182] it would therefore be paradoxical to insist that they be formally communicated to other interested States or international organizations. By refraining from such communication, the author of the declaration runs the risk that the declaration may not have the intended effect, but this is a different problem altogether. It does not seem necessary, therefore, to include a clarification of this point in the Guide to Practice.

131. This is not the case, however, with regard to conditional interpretative declarations, which require a reaction from other interested States or international organizations;[183] the procedure regarding their formulation must therefore be the same as that used for reservations.

132. The inclusion of a draft guideline on this point in the Guide to Practice could provide an opportunity for limiting the scope of article 23, paragraph 1, of the Vienna Conventions without changing the text, since it does not deal with interpretative declarations, by limiting the recipients of notifications to contracting States and international organizations and negotiating parties. The Special Rapporteur is of the view, however, that this minor change, while positive in itself, could give rise to confusion and that it would be artificial to provide for different procedures for the notification of instruments that are often difficult to distinguish clearly.

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[182] See para. 88 above.

[183] See para. 84 above.

133. For this reason, he believes that draft guideline 2.4.2[184] could be supplemented by a paragraph based on the text of draft guideline 2.1.5 and could also include the special rule governing the communication of reservations to the constituent instruments of international organizations, proposed above to supplement draft guideline 2.1.5.[185] The full text of the draft would therefore read as follows:

"**2.4.2** *Formulation of conditional interpretative declarations*

A conditional interpretative declaration must be formulated in writing.

Where necessary, the formal confirmation of a conditional interpretative declaration must be effected in the same manner.

A conditional interpretative declaration must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty. A conditional interpretative declaration regarding a treaty in force which is the constituent instrument of an international organization or which creates a deliberative organ that has the capacity to accept a reservation must also be communicated to such organization or organ."

[(b) Obligation of the depositary]

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[184] For the first two paragraphs of this draft guideline, see para. 87 above.

[185] See paras. 113 and 129 above.